SUPREME COURT, U. S.
JUL 27 1970
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IN THE

Supreme Court of the United States

October Term, 1970

No. 427

SIDNEY E. DAWSON,

Petitioner,

versus

ROBERT H. FINCH, Secretary of Health, Education and Welfare,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 12, 1970. Motion for a rehearing was timely made and overruled on the 18th day of June, 1970; and copies thereof are appended to the petition in the Appendix at page 14. The jurisdiction of this Court is invoked under 28 USC. 1254(1). As far as the petitioner knows, the said opinion of the Court has not been officially reported.

STATEMENT

The jurisdiction of the trial Court is conferred by Statute, 42 U. S. C. A. 406 (b) (1), as amended.

Lee W. Weldon's case, claimant herein was tried by his plaintiff's counsel on June 16, 1966 before the Hearing Examiner, who denied his claim, and was appealed by counsel to Appeals Council at Washington and likewise denied. The counsel, petitioner herein in due time made application to the trial Court to set his fee with his brief on record, showing the facts and law in favor of claimant, together with his complaint. After the defendant Secretary considered the same and without filing an answer, asked the Trial Court for a remand; and an order dated February 20, 1967 by the Court, it was remanded to the Administration for further consideration. It was again tried by the Hearing Examiner on April 28, 1967, petitioner's counsel representing him, and the trial resulted in favor of the client, Lee W. Weldon, and the decision was affirmed by the Appeals Counsel. After same petitioner herein, petitioned the Appeals' Council to set his fee, and was set by him under 42 U. S. C. A. 406 (a), giving the petitioner 25 per cent of the accrued benefits coming to the claimant, in the sum of $625.58. Tr. 1, which was reasonable.

In like manner petitioner herein, petitioned the Honorable Trial Court to set his fee in the same amount, it being reasonable in the sum of $625.58, being 25 per cent of the accrued benefits, under statute 42 U. S. C. A. 406 (b) (1); and that after a pretrial hearing the Court dismissed same on the ground that the trial court did not have jurisdiction (because 25 percent received in the Social Security Administration was all that he could get). Tr. 7.

The record shows that the plaintiff-appellant, petitioner, herein, tried this case twice, appealed it two different times, filed a brief of record and a complaint before the remand. It is agreed that there are no issues of fact, but issues of law, Tr. 14, 15.

The Petition for Certiorari is based on the Supreme Court Rule 19, Rule 23 and other Rules will be mentioned, as we proceed.

The grounds upon which the said petition for certiorari are based are as follows:

QUESTIONS PRESENTED

Whether the decision of the Court of Appeals for the Fifth Circuit herein is in direct conflict with the decisions of the Court of Appeals for the 1st, 4th, and 6th Circuits, and many Supplement cases; and in conflict with Statute 42 U. S. C. A. 406 (b) (1), 42 U.S.C.A. 406(a), and Code of Federal Regulations, Title 20, Section 404.974(a), all as follows:

1. Whether the decision of the Court of Appeals for the Fifth Circuit herein is in direct conflict with the first point as set out in said petition for rehearing in holding that the Social Security Administration has in effect the authority to determine the amount of the fee of attorney where his services were rendered in a case in the United States District Court?

Whether it is elementary that the Social Security Administration has sole jurisdiction to determine and evaluate the services of an attorney's fee rendered the claimant in the administration proceedings; and likewise whether the Court has sole jurisdiction to evaluate the services rendered by an attorney for the claimant in a judicial proceeding and to set his fee thereby?

The respondent, Secretary herein by taking cognizance of what happened in the administration proceeding as set up in this pleading, says you, petitioner, received an attorney's fee in the administration proceedings of 25 per cent of the accrued benefits coming to claimant as a fee, therefore, you are not permitted to receive any more in the district court, for the services performed on securing a remand.

2. Whether said ruling is in direct conflict with 20 C. F. R. providing that any services rendered by any representative in any proceeding before any State or Federal Court shall not be considered services rendered in any proceeding before the Social Security Administration, (for the purpose of setting a reasonable fee)? To set the same out in verbatim, the Code of Federal Regulations Title 20, Chapter 111, page 454 provides:

> "Section 404.074 (a) Representation of claimant in court proceeding. Any service rendered by any representative in any proceeding before any State or Federal Court shall not be considered services in any proceeding before the Social Security Administration for purposes of

(setting a reasonable attorney's fee), citing Britton v. Gardner, 270 F. Supp. 412.

Whether it is thereby shown if petitioner, Dawson, had he received any attorney's fee for the services performed by him for his client in the United States District Court, whether it could not be received before the Administration Proceeding, and could not be set up as a defense by them, which was done in this case at bar?

3. Whether the Court's decision is in direct conflict with the statute 42 U. S. C. A. 406(b) (1), which provides:

> "Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph".

Whether the court's decision is in conflict with the same, and whether the statute becomes inoperative, of no effect and void if the administration proceedings under 42 U. S. C. A. 406(a) awards an attorney a fee in the sum of 25 per cent for his successful representing the claimant before the administration proceedings; and when the attorney asks for a reasonable fee before the district court under said statute 406(b)(1) wherein said attorney either gets a remand or judgment on the merits, then the Secretary comes in and says: "You cannot get anything in addition, you have already got your fee"; and whether it appears the statute becomes void.

> The statute, 42 U. S. C. A. 406(a) provides as follows: The attorney who represents the claimant before the Social Security Administration and it is shown that he secured substantial gains for the claimant; and in order for him to obtain a reasonable fee for his representation must fill out an application being 20 C. F. R. Sec. 404.975(b), and show good cause for same, which petitioner did. And under 42 U. S. C. A. 406(a) he must show his fee to be reasonable, and is limited to not in excess of 25 per cent of the accrued benefits coming to the claimant as his fee. The attorney, petitioner herein received the said 25 per cent; and was truly in the jurisdiction of the Social Security Administration.

4. Whether the Court's decision is in conflict with the statute 42 U. S. C. A. 406(a) providing in substance

that when an attorney represents the claimant in the Administration Proceeding and the claimant receives substantial gains from his representation, the attorney is entitled to a reasonable fee not exceeding 25 per cent of the accrued benefits coming to the claimant as his fee; but if in the first place he receives his 25 per cent for his successful gains made to the claimant from the district court, after which he asks for his reasonable fee coming from the Administration, and is turned down on the ground that he has already received 25 per cent from the judicial proceedings the said statute becomes inoperative and void.

Petitioner herein would like for this Honorable Court to review the above 4 issues as questions as provided in Rule 23(c).

5. Whether the following cases and their circuits are in conflict with the decision of the Court in holding that if an attorney who appears in two forums should apply to each for the aliquot part of his total fee? Gardner v. Menedez, 373 F. 2d 488, 1967, First Circuit; Britton v. Gardner, 270 F. Supp. 412; and McKittrick v. Gardner, 378 F. 2d 872, 1967, 4th Circuit.

Whether these three cases would be in conflict with the decision of the Trial Court and the Decision of the Circuit Court of Appeals, because if one of the forums should give the attorney a reasonable fee of 25 per cent of the aliquot part of his total fee, would it deprive the other forum of its jurisdiction to give anything, and whether it would make it inoperative and void? That is the question in the case at bar.

6. And furthermore in the case of McKittrick v. Gardner as above shown, the court found in that case that there was a contingent fee contract, (same as the case at bar) the trial court approved a fee of 25 per cent on account of the contingent fee contract, the Secretary appealed on the ground that it was a contingent fee contract and too much, the Court of appeals remanded the case for further consideration on the ground that the fee was not proved to be reasonable; but the said court said it was up to the trial court to set and determine the fee after it was proved reasonable, that the Court had nothing to say about that. The court further said that the law was intended for an attorney to get part of his fee from each forum; and that in the same opinion and decision, the court held that where a counsel appears in two forums for his client or claimant, he should ask each for the aliquot part of his total fee. The question is:

Whether if the lower court granted the attorney a reasonable fee of 25 per cent of the accrued benefits coming to the claimant, would that preclude the attorney from receiving a reasonable attorney's fee for representing the claimant before the administration proceedings under 42 U. S. C. A. 406(a)?

SECRETARY'S DEFENSE IN LOWER COURT

In addition to the above when the petitioner herein filed his complaint in the trial court asking the court to set him a reasonable fee for the services performed under 42 U. S. C. A. 406(b) (1) as shown in his complaint and under his first Supplemental petition, Ap-

pendix p. 19, the Secretary filed a motion to dismiss on the following ground:

> On page 2 of said motion, Tr. 2, 3, it alleges "for any attorney, representing a claimant before a court to obtain allowance of a fee from the court for his services in the court must have entered a 'judgment favorable' to the claimant the attorney represented and if such a judgment obtained the court then could award him a fee not in excess of 25 per cent of past due benefits payable to the claimant under the court's judgment". And on page 3 of such brief Tr. 2, 3 to dismiss, further states:
>
> "No award was made by the court and since this is so, no award of a fee could be made by the court to the attorney pursuant to section 206 (b) of the Social Security Act."

In addition to the above and foregoing, the Secretary set up the fact that since petitioner had already received 25 percent of the accrued benefits coming to the claimant in the administration, the same should be dismissed; and the same was dismissed on the ground that the court never did have jurisdiction. The Decision of the Court Affirmed.

7. Petitioner in reply to the above and foregoing has set up in his brief on appeal to said court showing 7 cases where the court granted the right for an attorney to receive a reasonable fee even though the court did not grant a judgment for claimant on the

merits, but was on remand before the Secretary filed his answer. All of said courts mentioned hold substantially as follows:

> "Court could award an attorney's fee for substantial work done before the court, although court entered no judgment for specific benefits for alleged disability, but instead, ordered a remand to Secretary of Health, Education and Welfare who ultimately honored the claim for disability benefits".

Accepting the above and foregoing as true, the question is: Whether the petitioner is cut off from receiving a reasonable fee under 42 U. S. C. A. 406(b) (1), in the judicial proceedings on the remand petitioner obtained since he received a reasonable fee of 25 per cent of the accrued benefits coming to the claimant under 42 U. S. C. A. 406(a), being the Social Security administration?

THE REASONS RELIED ON FOR GRANTING THE WRIT OF CERTIORARI RULE 19

In the first place after thorough investigation on the part of the petitioner herein, in searching all the Federal Court records, and making extensive inquiry, petitioner finds no authority or Federal Court holding that when an attorney receives 25 per cent of the accrued benefits coming to the claimant in any one forum, that is all that he can get. As I understand this is the ruling and decision of the court herein. Since we have two forums involved in all of these Social Security

cases, is each forum supreme within its sphere of action?

On page 3 of the Court's Opinion, the Court says that this is a novel question.

The court says: "The novel question on this appeal is whether, under the provisions of section 206(b) of the Social Security Act, as amended, 42 U. S. C. A. Section 406(b), an attorney who has been authorized by the Secretary of Health, Education and Welfare to charge a fee of twenty-five per cent of the claimant's accrued benefits for his representation of the claimant in the administrative proceeding may obtain authorization from the District Court to charge an additional twenty-five per cent for his representation of the claimant before the Court." May the petitioner herein qualify the above by saying that the petitioner herein asked for a reasonable fee under the statute 42 U. S. C. A. 406 (b) (1) in the District Court, and thought that he ought to have 25 per cent for he only got a small fee in the other forum. The District Court could have given any fee not exceeding 25 per cent of the accrued benefits coming to the claimant, if he so desired, if it was reasonable.

The court says that this is a novel question for he cites no authority or cases holding same.

This is a far reaching opinion and it will go down as authority in the United States in all of the many different courts thereof as a precedent to follow; and the lawyers and all courts are supposed to follow the

same together with all who are connected with the Social Security Act of the United States.

It appears in conflict with quite a few decisions and circuits as cited above where the decisions of the courts hold that if an attorney appears for the claimant in two different forums, he must apply to each for the aliquot part of his total fee; and that if one forum gives the attorney 25 per cent of the accrued benefits coming to the claimant as his fee, however small and inadequate it might be he is precluded from seeking a fee in the other forum, contrary to statute.

In order to make all the circuits and decisions uniform, it should come from the decisions of the Honorable Supreme Court of the United States of America.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari be granted.

Sidney E. Dawson, Petitioner,
Attorney for Himself,
1221 Davis Building,
1309 Main Street
Dallas, Texas 75202.

CERTIFICATE OF COUNSEL

I, Sidney E. Dawson, as Petitioner do hereby certify that the foregoing petition for a Writ of Certiorari is presented in good faith and not for delay.

_____

CERTIFICATE OF SERVICE

I, Sidney E. Dawson, Attorney for Petitioner in the above entitled cause, hereby certify that on the ____ day of July 1970, I served the attached Petition for Writ of Certiorari upon Miss Kathryn Baldwin, Respondent, Washington, D. C. 20530.

_____

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
Edward W. Wadsworth, Clerk
Room 408 — 400 Royal St.
New Orleans, La. 70130

June 29, 1970

Mr. Sidney E. Dawson
Attorney at Law
Davis Building
Dallas 2, Texas

No. 28364 — Sidney E. Dawson vs.
Robert H. Finch, etc.

Dear Mr. Dawson:

Receipt is acknowledged of your letter of June 27 together with enclosed motion for stay of the issuance of the mandate pending petition for writ of certiorari. As you now know, the mandate has already been issued since the application for stay was not filed prior thereto which now requires that you file a supplement to the motion requesting a recall and stay of the issuance of the mandate, if you consider that necessary. However, there is no rule requiring that a mandate be stayed in order for an application for writ of certiorari to be filed. Since you were unsuccessful below

and unsuccessful here, there may not be any necessity for you to stay the issuance of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
(Signed) G. F. GANUCHEAU
G. F. Ganucheau
Chief Deputy Clerk

GFG:cfs
cc: Miss Kathryn H. Baldwin

Brief by Sidney E. Dawson

Since the trial Court dismissed this cause of action in the lower court for want of jurisdiction, and was affirmed by the higher court.

There was no judgment entered against the petitioner herein upon which execution can issue, and there was no need of a stay, the same was dismissed. Vol. 5, Benders Forms 5069, Sec. 234.1

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No. 437

In the Supreme Court of the United States

OCTOBER TERM, 1970

SIDNEY E. DAWSON, PETITIONER

v.

ELLIOT L. RICHARDSON,
SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 427

SIDNEY E. DAWSON, PETITIONER

v.

ELLIOT L. RICHARDSON,
SECRETARY OF HEALTH, EDUCATION AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. The facts in the case, as stated by the court of appeals (Pet. Supp. App. 5-6), are undisputed. Petitioner Dawson is an attorney who represented a claimant for social security disability benefits. He began such representation at the administrative hearing; the hearing examiner denied benefits; and the Appeals Council denied review. Dawson and the claimant then made a 50 percent contingent fee con-

tract, and Dawson instituted an action in the district court for judicial review of the administrative denial of benefits.

On motion of the Secretary before answer, the case was remanded for further administrative proceedings, which resulted in an award of accrued benefits of $2,502.30. Dawson collected half of this amount as his fee and then sought the Secretary's approval of that fee. The Secretary authorized a fee of $625.58—25 percent of the accrued benefits—for Dawson's services in representing the claimant in the administrative proceedings, and advised Dawson that charging a greater fee would expose him to the penalties provided in 42 U.S.C. (Supp. V) 406(a).

Dawson brought the present action in the district court, seeking a fee of $625 for representing the claimant before the court. The district court dismissed the complaint and the Fifth Circuit affirmed. It held that 42 U.S.C. 406 "precludes the aggregate allowance of attorney's fees greater than twenty-five percent of the past due benefits received by the claimant," the amount which the Secretary had authorized (Pet. Supp. App. 12).

2. The court of appeals correctly held that 42 U.S.C. 406(b) bars a court from granting an attorney's fee in social security disability cases where the Secretary has already awarded a fee of 25 percent of the accrued benefits. That section (Pet. Supp. App. 6-7) permits a district court, upon rendering a judgment in favor of a claimant, to allow an attorney's fee "not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by

reason of such judgment," and authorizes the Secretary to pay that fee directly to the attorney out of the accrued benefits. The legislative history the court of appeals cited indicates that Congress intended to preclude the charging of "inordinately large fees" in social security cases—which one witness at the hearings described as "frequently one-third to one-half of the accrued benefits" (Pet. Supp. App. 9). It would violate this policy for the court to award petitioner a fee in addition to the 25 percent given by the Secretary.

Contrary to petitioner's contention (Pet. 3, 7), the decision below is not in conflict with the decisions of any other courts of appeals. As the court of appeals below pointed out, "[n]one of these cases support the allowance of separate twenty-five percent fees by the Secretary and the court. In fact, none of the cases authorized a total fee in excess of twenty-five percent" (Pet. Supp. App. 11).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

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